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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ART FRANK ONTIVEROS, Defendant and Appellant.	B230058 (Los Angeles County Super. Ct. No. KA090196)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mike Camacho, Judge. Affirmed.

Janet J. Gray, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Joseph P. Lee, Stephanie A. Miyoshi and Dana M. Ali, Deputy Attorneys General, for Plaintiff and Respondent.

Art Frank Ontiveros appeals from the judgment entered after his conviction by a jury of attempted murder with true findings on related gang and weapon-use enhancements. Ontiveros contends the trial court committed prejudicial error in its evidentiary rulings and when instructing the jury and he received constitutionally ineffective assistance from his counsel. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Crime*

On the late afternoon of April 3, 2010 Eric Richards parked his car in front of an apartment complex on North Cerritos Avenue in Azusa, where his grandmother lived. Two light-skinned men stood outside the gate of the complex; another stood inside. As he approached the gate of the complex, one of the men asked Richards, who is African American, where he was from. Richards responded he was not from anywhere. The man pulled out a long kitchen knife and stabbed Richards in the right side of the chest. Richards screamed and ran toward his car. The man chased Richards and stabbed him in his lower back. Richards fell, turned over and tried to get up; but his assailant stabbed him repeatedly in the face as Richards attempted to ward off the blows with his hands. Richards begged the man not to kill him. The man stared at him, then ran southbound on Cerritos Avenue. Richards did not see where the man's companion went.

2. *Ontiveros's Arrest and Identification*

Richards ran to the locked gate of the apartment building and asked Santos Guillermo Pineda, who stood on the other side of the gate, to open it. Pineda was unable to open the gate but called the police emergency hotline. Emergency personnel responded within minutes. Richards and Pineda described the assailant as a light-skinned man with a mustache, goatee and tattoos on his face, wearing jeans and a black hooded sweatshirt.

Azusa Police Officer Bertha Parra responded to the radio call describing the attack and began searching the area south of the complex. Two or three blocks from the complex, she saw Ontiveros walking along the street wiping his face and hands with a towel. She drove past him, made a U-turn, approached Ontiveros and asked to speak to

him. He replied with an obscenity and continued walking. Parra identified herself as a police officer and ordered Ontiveros to stop. When he kept walking, Parra requested additional units to help detain him. Parra and the additional officers blocked Ontiveros's path and ordered him to put his hands up. Ontiveros removed his black T-shirt, revealing multiple gang tattoos, and shouted obscenities and gang slogans at the officers, who forcibly arrested him.

Approximately 10 minutes after police had responded to the emergency call, officers drove Pineda to the location of Ontiveros's arrest for a field show-up. Pineda identified Ontiveros as the attacker.

Richards, meanwhile, had been transported by ambulance to USC's Trauma Center. As a result of the attack, Richards lost part of his lip and suffered substantial blood loss from the wound to his back. In the early morning after the attack, Azuza Police Detective Dennis Tremblay showed Richards a photographic lineup ("six-pack") containing pictures of light-skinned, Hispanic men with shaved heads and mustaches. Two of the men had tattoos on their necks; a third, Ontiveros, had tattoos on both cheeks. The remaining three men bore no visible tattoos. Richards identified Ontiveros as his attacker.

3. *The Charges and Trial Proceedings*

Ontiveros was charged by information with one count of attempted willful, deliberate and premeditated murder (Pen. Code, §§ 187, subd. (a); 664).[1] The information further alleged Ontiveros had personally used a knife (§ 12022, subd. (b)(1)) and had committed the crime for the benefit of, at the direction of or in association with a criminal street gang (§ 186.22, subd. (b)(4)). It was also alleged he had suffered one prior serious or violent felony conviction (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)) and had served four prior separate prison terms for felonies (§ 667.5, subd. (b)).

Richards and Pineda testified at trial and identified Ontiveros as the attacker. Detective Tremblay testified as a gang expert and identified Azusa 13 as "the most

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[1] Statutory references are to the Penal Code unless otherwise indicated.

significant" gang in Azusa. Controlled by the Mexican Mafia, Azusa 13 is a Hispanic "South Sider" gang.[2] Its primary activities include assaults, robberies, drug sales and intimidation and assaults on African Americans, whom, Tremblay stated, the gang sought to eradicate from its territory. Ontiveros's allegiance and stature within the gang were reflected in his tattoos: "Azusa" on his chest, the letter "A" on his right cheek, the number "13" on his left cheek, "South" across his upper back, "Sider" across his lower back, and other gang-related tattoos on his arms, hand and head. Tremblay testified Ontiveros was "obviously a well-respected member of the gang to be allowed to have these tattoos on his face."

Detective Tremblay had spoken with Ontiveros on another occasion and knew him as an active member of Azusa 13. The apartment complex where Richards was attacked was in Azusa 13 territory. Answering a hypothetical question based on the same facts as those presented in this case, Tremblay opined the attack on Richards was consistent with Azusa 13's goal of ridding its territory of African Americans.

Ontiveros testified on his own behalf. Thirty-two years old at the time of trial, he admitted he had been a member of Azusa 13 since he was "a kid" but claimed he was not really active any longer. He now regretted the tattoos on his face—which he had had about five years—and knew other people with similar tattoos but refused to identify them. He did not stop at Officer Parra's request because he normally did not cooperate with police. He had been convicted of crimes in the past—mostly parole violations—and had been incarcerated most of the previous 10 years. He had been released from prison on March 31, 2010, four days before the assault on Richards.

Ontiveros did not know Richards and had not assaulted him. He disagreed with Detective Tremblay that members of Azusa 13 were biased against or targeted African Americans. At the time of the attack he had attempted to visit a friend near the complex,

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[2] Detective Tremblay testified a South Sider or South Sider Cedeno is "a soldier for the Mexican Mafia."

but the friend was not home. He refused to identify his friend even after the court ordered him to do so.

In rebuttal the prosecutor asked Detective Tremblay whether his opinion about the assault's gang-related purpose would change if the suspect had spent a considerable amount of time in prison during the previous 10 years. Tremblay testified such a person would become "institutionalized" and it would be difficult for him to adapt to life on the outside. Because prison inmates are racially segregated, the person would be more inclined to attack an African American who came into Azusa 13 territory. Tremblay also stated the attack resembled a prison attack in that prisoners learn to target a victim's vital organs, arteries and veins. Here, the assailant had struck at Richards's head and neck, taking the attack beyond a mere confrontation.

The jury convicted Ontiveros of attempted murder and found true the special gang and weapon-use allegations. In a bifurcated court trial the court found the prior conviction and three of the prior prison term allegations true. Ontiveros was sentenced to state prison for an indeterminate sentence of 15 years to life, plus one year for the knife-use enhancement and one year for each of the three prior prison term findings for an aggregate sentence of 19 years to life.

CONTENTIONS

Ontiveros contends the trial court erred in admitting evidence of his prior prison record and allowing Detective Tremblay to rely on hearsay statements in forming his expert opinion about Azusa 13's animosity toward African Americans. Ontiveros also contends his counsel provided ineffective assistance by failing to request sanitization of his prior convictions used for impeachment, failing to move to exclude evidence of Richards's and Pineda's identifications of him because of overly suggestive police procedures, eliciting inadmissible evidence relating to his criminal history and improperly suggesting the court limit his argument to the jury regarding the lack of DNA evidence at the trial. In addition, Ontiveros contends the court erred in instructing the jury with CALCRIM No. 371 on consciousness of guilt and improperly denied his request for an alibi instruction.

DISCUSSION

1. *Ontiveros Has Forfeited the Issue Whether His Recent Release from Prison Was Properly Admitted*

As a general rule, a witness's credibility, including that of a defendant who elects to testify, may be impeached by evidence of prior felony convictions provided "the least adjudicated elements of the conviction necessarily involve moral turpitude." (Evid. Code, § 788; see *People v. Castro* (1985) 38 Cal.3d 301, 306; *People v. Feaster* (2002) 102 Cal.App.4th 1084, 1091.)[3] The admission of felony convictions or other past misconduct to impeach a witness is subject to the trial court's discretion under Evidence Code section 352, which authorizes the court to exclude such evidence when its probative value on the issue of credibility is substantially outweighed by the risk of undue prejudice. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295; accord, *People v. Mendoza* (2000) 78 Cal.App.4th 918, 925.) The trial court's discretion in this regard is "as broad as necessary to deal with the great variety of factual situations in which the issue arises, and in most instances the appellate courts will uphold its exercise whether the conviction is admitted or excluded." (*People v. Collins* (1986) 42 Cal.3d 378, 389.) However, as the Supreme Court observed in *People v. Watson* (2008) 43 Cal.4th 652, 686, "We have never considered whether a witness may be impeached with the length of a prison sentence when offered not to prove the fact of the conviction, but rather to prove the witness has some other motive or bias."

In their case-in-chief the People intended to have Detective Tremblay testify Ontiveros had been released from prison days before the stabbing to support his opinion the stabbing had been motivated by racial prejudice. Before asking Tremblay, the prosecutor inquired at sidebar whether he was permitted to do so. Defense counsel

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[3] Moral turpitude is defined as the "general readiness to do evil" (*People v. Castro, supra,* 38 Cal.3d at p. 314) and does not depend on dishonesty being an element of the crime. (*Id.* at p. 315; *People v. Feaster, supra,* 102 Cal.App.4th at p. 1091.) The "least adjudicated elements" test means that "from the elements of the offense alone—without regard to the facts of the particular violation—one can reasonably infer the presence of moral turpitude." (*People v. Thomas* (1988) 206 Cal.App.3d 689, 698; accord, *Feaster,* at p. 1091.)

objected, insisting it would be prejudicial. The trial court ruled the proposed evidence, although relevant, would be excluded under Evidence Code section 352 as unduly prejudicial in light of the existing gang evidence. However, the court cautioned both parties Ontiveros's recent prison release would be "fair game" if he chose to testify. Defense counsel interposed an objection "for the record."

Immediately before the People rested their case-in-chief, the prosecutor renewed his request to introduce evidence of Ontiveros's recent release from prison based on defense counsel's cross-examination of Detective Tremblay. The court responded, "I appreciate you raising the issue again. I understand why you're doing so. But your request may be a moot issue. In the event that Mr. Ontiveros testifies, certainly it is fair game at that point. And perhaps to rebut any reply that he may [give] to that inquiry; it is fair game to recall your detective for that purpose. . . . And from what I understand, Mr. Ontiveros is going to testify. These issues will become relevant and probative as described by the prosecution. And, certainly, a permissible area of inquiry." Defense counsel made no further objection.

During direct examination in the defense case, Ontiveros testified he had been incarcerated multiple times and had been released from prison days before the attack. The People then called Detective Tremblay in rebuttal to opine that a person recently released from prison had been "institutionalized" and would have a difficult time adapting to life on the street. A stabbing under these circumstances was also more likely to have been racially motivated because of recent exposure to the Mexican Mafia's hatred of African Americans and enforced prison racial segregation. Tremblay added the stabbing itself resembled a prison attack because the attacker aimed at Richards's face and neck in an attempt to inflict a mortal wound.

Ontiveros argues on appeal the fact he had recently been released from prison should have been excluded under Evidence Code section 352 as unduly prejudicial whether or not he testified and admission of this inflammatory evidence violated his due process right to a fair trial. In different circumstances we might accept Ontiveros's invitation to consider whether an expert may properly base an opinion that an aggravated

assault was racially motivated based on the general institutional experiences and attitudes of a gang member recently released from prison. However, he has forfeited this issue. Rather than pose a specific objection to the People's attempt to elicit information about his recent release from prison for this purpose, Ontiveros's counsel initially objected only that the information was "prejudicial" and then chose to introduce evidence of his recent release from prison during his direct examination, presumably to control its impact on the jury. This was a deliberate, tactical defense choice made after the trial court had denied the People's attempt to introduce the testimony in their case-in-chief. The court's ruling on that particular question did not resolve the admissibility of the information for all purposes. Standing alone, the evidence Ontiveros had recently been released from prison was not unduly prejudicial, and he remained obligated to object to its use for an improper purpose. Any prejudice associated with his recent release arose from Detective Tremblay's reliance on the information to opine a person recently released from prison would be motivated by racial prejudice to attack an African-American man. Ontiveros failed to object to the use of this information by Tremblay. Accordingly, there was no error by the trial court on either point.

2. *Ontiveros's Claims of Ineffective Assistance of Counsel Lack Merit or Are Premature*

a. *Legal standard*

To establish ineffective assistance of counsel, a defendant must demonstrate that "(1) counsel's representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation subjected the petitioner to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the petitioner." (*In re Neely* (1993) 6 Cal.4th 901, 908; accord, *Strickland v. Washington* (1984) 466 U.S. 668, 686 [104 S.Ct. 2052, 80 L.Ed.2d 674].) "'The burden of sustaining a charge of inadequate or ineffective representation is upon the defendant. The proof . . . must be a demonstrable reality and not a speculative matter.'" (*People v. Karis* (1988) 46 Cal.3d 612, 656.) There is a presumption the challenged action "'might be considered

sound trial strategy'" under the circumstances. (*Strickland*, at p. 689; accord, *People v. Dennis* (1998) 17 Cal.4th 468, 541.)

On direct appeal a conviction will be reversed for ineffective assistance of counsel only when the record demonstrates there could have been no rational tactical purpose for counsel's challenged act or omission. (*People v. Lucas* (1995) 12 Cal.4th 415, 442; see *People v. Mitcham* (1992) 1 Cal.4th 1027, 1058 ["'[i]f the record sheds no light on why counsel acted or failed to act in the manner challenged, "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation" [citation], the contention [that counsel provided ineffective assistance] must be rejected'"].)

b. *Prior convictions*

Ontiveros contends his trial counsel provided ineffective assistance by failing to request sanitization of his prior convictions before their admission and by eliciting testimony about the convictions in his direct examination of Ontiveros. As explained above, it appears Ontiveros's counsel approached the prior convictions in this manner as part of his trial tactics. Pursuing a defense theory of misidentification, Ontiveros's counsel sought to humanize his client by having him speak directly to the jury and candidly disclose his prior convictions, apparently attempting to contain the damage associated with the convictions by portraying them as the product of impulsive youth and misguided allegiance to the gang members who surrounded him. In light of this approach, any claim of ineffective assistance based on Ontiveros's disclosure of his prior convictions must be pursued through a petition for habeas corpus. (See, e.g., *People v. Jones* (2003) 29 Cal.4th 1229, 1263 ["[a]s the record on appeal does not reveal why defense counsel chose not to object to this line of questioning, this ineffective assistance of counsel claim would be more appropriately raised on a habeas corpus petition"]; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 [a claim of ineffective assistance of counsel relating to "'why counsel acted or failed to act in the manner challenged'" is more appropriately decided in a habeas corpus proceeding"].)

c. *The allegedly suggestive identification procedures*

Ontiveros next contends his trial counsel provided ineffective assistance by failing to move to exclude Pineda's and Richards's identifications of him. This contention lacks merit because the identifications were plainly admissible.

Due process requires the exclusion of identification testimony "if the identification procedures used were unnecessarily suggestive" and "the resulting identification was also unreliable." (*People v. Yeoman* (2003) 31 Cal.4th 93, 123.) The defendant bears the burden of proving unfairness "as a 'demonstrable reality,' not just speculation." (*Ibid.*) The threshold issue is whether the identification *procedure* was unduly suggestive and unnecessary. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.) If that initial question is answered in the affirmative, the court must then determine whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the witness's opportunity to view the offender at the time of the crime, the witness's attentiveness, the accuracy of the witness's prior description, the level of certainty displayed at the identification and the time elapsed between the crime and the identification. (*People v. Ochoa* (1998) 19 Cal.4th 353, 412; *People v. Wash* (1993) 6 Cal.4th 215, 244.)

There is no indication Pineda's identification of Ontiveros was based on unduly suggestive procedures. A "'"single person showup" is not inherently unfair,'" and consequently need not, absent unusual circumstances, be excluded from the presentation of evidence on due process grounds. (*People v. Floyd* (1970) 1 Cal.3d 694, 714 [single person showup identification procedure conducted at the jail within several hours of a robbery did not violate due process], disapproved on another ground in *People v. Wheeler* (1978) 22 Cal.3d 258, 287, fn. 36; see also *In re Richard W.* (1979) 91 Cal.App.3d 960, 969-970 [no due process violation when witness identified suspect shortly after burglary while suspect was handcuffed and seated in the back of a patrol car]; *People v. Savala* (1981) 116 Cal.App.3d 41, 49 [no due process violation where showup procedures were "factually similar" to those in *Richard W.*]; *People v. Contreras* (1993) 17 Cal.App.4th 813, 820 [police officer "[t]elling a witness suspects are in custody . . . is not

impermissible" in context of identification procedure].) In fact, "single-person show-ups *for purposes of in-field identifications* are encouraged, because the element of suggestiveness inherent in the procedure is offset by the reliability of an identification made while the events are fresh in the witness's mind, and because the interests of both the accused and law enforcement are best served by an immediate determination as to whether the correct person has been apprehended." (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 387.) Here, Pineda had already described the assailant to the police—including the existence of facial tattoos—who then promptly located Ontiveros within blocks of the attack. According to Pineda, he had been admonished the detained suspect might not be the assailant. When Pineda saw Ontiveros, he told the officer, "That is him. I am sure that is him." This was a textbook example of the proper use of a single person showup under exigent circumstances and was not unduly suggestive.

Ontiveros's assertion the six-pack photographic lineup shown to Richards was unduly suggestive is equally misplaced. Detective Tremblay assembled the photographic lineup based on Pineda's identification of Ontiveros as the attacker. He presented the lineup, which contained photographs of six light-skinned, lean Hispanic men with shaved heads and facial hair wearing similar T-shirts, to Richards in his hospital bed in the early hours of the morning after the attack. Two of the men depicted had visible tattoos on their necks; Ontiveros was the only one with facial tattoos, which he claims unfairly distinguished him as the attacker. Although the facial tattoos undoubtedly played a role in Richards's identification of Ontiveros as his attacker, Richards testified the tattoos were not the primary reason for his identification of Ontiveros. Richards had ample opportunity to observe Ontiveros during the attack and noted in particular the moment when Ontiveros stared at him as he lay bleeding on the ground. Nothing in Richards's previous description of Ontiveros excluded him as the attacker (other than the hooded sweatshirt), and Richards testified he was certain Ontiveros was the person who had attacked him. Under these circumstances, there was no substantial likelihood of misidentification (see *People v. Cunningham* (2001) 25 Cal.4th 926, 990 [no substantial likelihood of misidentification when witness had opportunity to view defendant for

several minutes, described defendant to police and identified defendant in photographic lineup]), and no obligation on the part of Ontiveros's counsel to object to the identification procedures. (See *People v. Coddington* (2000) 23 Cal.4th 529, 577 ["[b]ecause the claim lacks merit, petitioner cannot satisfy either prong of the constitutional test of ineffective assistance"], overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

d. *Allegedly inadmissible character evidence*

Ontiveros also challenges his trial counsel's questioning of Detective Tremblay about Ontiveros's past violent acts, including stabbings or shootings. Although risky, the decision to pursue this line of questioning was tactical in nature and consistent with the defense effort to neutralize Ontiveros's appearance, including his multiple gang tattoos, by emphasizing the lack of violence in his previous criminal record, other than a conviction as a juvenile for assaulting his sister.[4] To be sure, the testimony Ontiveros gave opened the door to further questions about incidents Ontiveros appeared not to have disclosed to his counsel. However, on the facts presented by the record, Ontiveros must pursue any claim of ineffective assistance by seeking a writ of habeas corpus.

e. *Counsel's self-imposed limits on closing argument*

Ontiveros additionally contends his counsel improperly asked the court to limit his own argument to the jury after the prosecutor's tardy disclosure that DNA test results had confirmed the existence of Richards's blood on the clothes worn by Ontiveros at the time of his arrest. The court denied the prosecutor's request to reopen the case to introduce the evidence on the ground it had been produced too late. Ontiveros's counsel then asked whether he should abandon a planned portion of his closing argument noting the People had failed to produce any DNA evidence tying his client to the crime. The court indicated counsel would be allowed to note the absence of DNA evidence but cautioned both counsel not to mislead the jury. Ontiveros now claims his counsel breached his duty to zealously represent him.

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[4] Ontiveros testified the attack on his sister had actually been precipitated by the conduct of her boyfriend and Ontiveros had been trying to protect his sister.

As the parties acknowledge, all counsel have an ethical duty not to mislead a jury under the Rule 5-200(B) of the State Bar Rules of Professional Conduct. It is by no means clear defense counsel could have noted the absence of DNA evidence at trial without improperly misleading the jury by suggesting no such DNA evidence existed. In any event, in light of the eyewitness identifications, it is not reasonably probable Ontiveros would have received a more favorable verdict had counsel made a narrow, ethically permissive argument on this point. (See *In re Fields* (1990) 51 Cal.3d 1063, 1079 [In considering a claim of ineffective assistance of counsel, it is not necessary to determine "'whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'"].)

3. *The Trial Court Did Not Commit Error Under Crawford v. Washington*

Ontiveros contends the admission of testimonial hearsay statements, in the guise of Detective Tremblay's expert opinion, violated his Sixth Amendment right to confront and cross-examine witnesses. (See *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*).) Ontiveros complains portions of Tremblay's testimony—relating to the racial prejudices of the Mexican Mafia and the Azusa 13 gang and unspecified instances of violent conduct by Ontiveros—were based on statements made by unidentified and unnamed sources. Although at trial Ontiveros objected on hearsay grounds, he did not raise a Confrontation Clause claim. Assuming this claim of error was not forfeited (see, e.g., *People v. Redd* (2010) 48 Cal.4th 691, 730 & fn. 19; *People v. Chaney* (2007) 148 Cal.App.4th 772, 779), we reject it.

An expert may generally base his or her opinion on any matter known to the expert, including hearsay not otherwise admissible, which may "reasonably . . . be relied upon" for that purpose. (Evid. Code, § 801, subd. (b); see *People v. Montiel* (1993) 5 Cal.4th 877, 918-919 (*Montiel*); *People v. Gardeley* (1996) 14 Cal.4th 605, 617-618 (*Gardeley*).) As *Gardeley* explained, expert testimony may be "premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied

upon by experts in the particular field in forming their opinions." (*Gardeley*, at p. 618.) So long as the material is reliable, "even matter that is ordinarily inadmissible can form the proper basis for an expert's opinion testimony." (*Ibid.*, italics omitted.)

"[A]dmission of expert testimony based on hearsay will typically not offend [C]onfrontation [C]lause protections because 'an expert is subject to cross-examination about his or her opinions and additionally, the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert's opinion.'" (*People v. Sisneros* (2009) 174 Cal.App.4th 142, 154.) Moreover, not every conversation between a gang member and a gang expert constitutes "interrogation" or results in testimonial evidence for confrontation clause purposes within the meaning of *Crawford* and its progeny. (See *Michigan v. Bryant* (2011) 562 U.S. ___, ___ [131 S.Ct. 1143, 1152-1153]; *People v. Blacksher* (2011) 52 Cal.4th 769, 811-812.) "[T]he touchstone questions are whether a statement is hearsay offered against a criminal defendant, whether the statement is otherwise admissible under a hearsay exception, and, if so, whether the statement is testimonial." (*Blacksher*, at p. 813.)

To date, a number of appellate courts have held *Crawford* does not preclude the use of hearsay that forms the basis of an expert's opinion, reasoning that hearsay in support of an expert opinion is not the sort of testimonial hearsay barred by that decision (*People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427) or that hearsay relied on by experts in formulating their opinions is not testimonial because not offered for the truth of the facts stated. (See *People v. Cooper* (2007) 148 Cal.App.4th 731, 747; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210; see generally *People v. Sisneros*, *supra*, 174 Cal.App.4th at pp. 153-154 [discussing cases].)

We agree with the analysis of these courts. *Crawford* is not implicated by Detective Tremblay's expert testimony. His testimony concerning instances of violence by Ontiveros was elicited on cross-examination by defense counsel, thus opening the door for the People to inquire further about them. As to statements about prejudice against African Americans, Tremblay's knowledge of racial prejudice endemic in prison

gangs like the Mexican Mafia and its street gang adherents[5] is exactly the type of expert testimony contemplated by *Gardeley* and its progeny. So, too, is Tremblay's knowledge culled from his years of gang investigation. (See *Gardeley, supra,* 14 Cal.4th at p. 620 [opinion properly based on expert's "personal investigations of hundreds of crimes committed by gang members," together with information from colleagues in law enforcement]; accord, *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324; *People v. Vy* (2004) 122 Cal.App.4th 1209, 1223, fn. 9 [citing cases].)

4. *The Trial Court Did Not Commit Instructional Error*

Ontiveros contends the trial court prejudicially erred in instructing the jury pursuant to CALCRIM No. 371 (consciousness of guilt) and refusing to instruct pursuant to CALCRIM No. 3400 (alibi). Both contentions lack merit.

a. *CALCRIM No. 371*

During review of proposed jury instructions, the court informed defense counsel it intended to instruct the jury with CALCRIM No. 371 based on Richards's testimony his attacker had worn a hooded sweatshirt and used a knife in the attack and it could reasonably be inferred that Ontiveros had discarded or concealed those items before he was stopped by Officer Parra. Defense counsel objected. Nonetheless, the court instructed the jury: "If the defendant tried to hide, conceal or discard evidence against him, that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself." Ontiveros contends this instruction was not supported by the evidence because the police never located the sweatshirt or knife described by Richards and Pineda.

"A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." (*People v. Mendoza* (2000) 24 Cal.4th 130, 180 (*Mendoza*).) "'[I]n

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[5] The "13" in the name Azusa 13 identifies the gang's allegiance to the Mexican Mafia; the letter M (the Mexican Mafia is also known as La Emé) is the 13th letter of the alphabet.

order for a jury to be instructed that it can infer a consciousness of guilt from suppression of adverse evidence by a defendant, there must be some evidence in the record which, if believed by the jury, will sufficiently support the suggested inference.'" (*People v. Hart* (1999) 20 Cal.4th 546, 620 [discussing predecessor instruction CALJIC No. 206].)

Here, the only evidence relating to the sweatshirt and knife came from Richards and Pineda, who testified the attacker wore a sweatshirt and wielded a knife. Although Richards and Pineda identified Ontiveros as the perpetrator, there was no other, independent evidence linking him to those items (for example, that he had been seen earlier in the day wearing a hooded sweatshirt); and thus no evidence that he had attempted to conceal or dispose of them. In short, the instruction was not supported by the evidence. (See, e.g., *People v. Tate* (2010) 49 Cal.4th 635, 698 [substantial evidence supported instruction on concealing evidence where defendant threw away bloody socks and the red leather suit he was wearing on the day of the murder had been washed]; *People v. Hart, supra,* 20 Cal.4th at p. 621 [record contained evidence defendant disposed of victim's purse, removed bumper stickers from his car, burned his shoes and changed his hair style]; *People v. Breaux* (1991) 1 Cal.4th 281, 304, fn. 7 [consciousness of guilt instruction supported by evidence defendant substituted license plates on victim's car].

Nonetheless, any error in giving the instruction was harmless because it is not reasonably probable Ontiveros would have obtained a more favorable result had the instruction not been given. (See *People v. Mower* (2002) 28 Cal.4th 457, 484 [if trial court's instructional error violates California law, appellate court applies harmless error standard stated in *People v. Watson* (1956) 46 Cal.2d 818, 836]; *People v. Jennings* (2010) 50 Cal.4th 616, 677 ["'[w]hen an appellate court addresses a claim of jury misinstruction, it must assess the instructions as a whole, viewing the challenged instruction in context with other instructions, in order to determine if there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner'"].) CALCRIM No. 371 instructed the jury that "[i]f you conclude that the defendant made . . . an attempt [to hide, conceal or discard evidence], it is up to you to

decide its meaning and importance." The instruction admonishes the jury to consider the weight and significance of the evidence only if it first finds that the defendant did in fact discard evidence. Further, the instruction advised the jury an attempt to discard evidence "cannot prove guilt by itself." Other instructions informed the jury that certain instructions may not be applicable to the case. Specifically, the trial court stated, "Some of these instructions may not apply depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I'm suggesting anything about the facts. After you've decided what the facts are, follow the instructions that do apply to the fact[s] as you find them."

These instructions thus adequately alerted the jury it should disregard any instructions that were not applicable to the facts of the case. The jury, by its verdict, rejected Ontiveros's claim he was not Richards's attacker; and the eyewitness identifications were far more probative of that fact than any inference Ontiveros discarded the sweatshirt and knife.

b. *CALCRIM No. 3400*

Ontiveros contends the evidence required the court instruct the jury with CALCRIM No. 3400, which states: "The People must prove that the defendant committed [the charged crime[s].] The defendant contends (he/she) did not commit (this/these) crime[s] and that (he/she) was somewhere else when the crime[s] (was/were) committed. The People must prove that the defendant was present and committed the crime[s] with which (he/she) is charged. The defendant does not need to prove (he/she) was elsewhere at the time of the crime. [¶] If you have a reasonable doubt about whether the defendant was present when the crime was committed, you must find (him/her) not guilty."

A jury instruction that pinpoints the essence of the defense, such as alibi, must be given on request when substantial evidence supports the theory. (*People v. Jennings, supra,* 50 Cal.4th at pp. 674-675; *People v. Saille* (1991) 54 Cal.3d 1103, 1119.) Here, Ontiveros testified he had attempted to visit a friend who lived near the site of the attack immediately before he was arrested. He refused, however, to identify either the friend's

name or address. The trial court, in considering Ontiveros's request for the alibi instruction, found there was insufficient evidence to support it: "Although the evidence is uncontested that [Ontiveros] was detained in the immediate area of the crime, I cannot ignore the fact that [he] deliberately refused to answer questions on cross-examination regarding his whereabouts at or near the time of the alleged incident. This conduct, which was also in direct violation of several court orders [to answer questions posed on cross-examination] . . . effectively denied the prosecution their right of cross-examination on the issue of alibi. Now, to give this alibi instruction, as requested by the defense, would essentially allow [Ontiveros] to benefit from his contemptuous behavior and receive the fruit of his misconduct."

The trial court was correct. "[T]he right to introduce evidence necessarily implicates the responsibility to permit [that evidence] to be fairly tested." (*Fost v. Superior Court* (2000) 80 Cal.App.4th 724, 736.) Although a criminal defendant has a constitutional right to testify in his or her own behalf, that right is tempered by the corollary principle that, once the defendant chooses to testify, the People may fully amplify that testimony "'by inquiring into the facts and circumstances surrounding [the defendant's] assertions, or by introducing evidence through cross-examination [that] explains or refutes [the defendant's] statements or the inferences [that] may necessarily be drawn from them.'" (*People v. Harris* (1981) 28 Cal.3d 935, 953; accord, *People v. Seminoff* (2008) 159 Cal.App.4th 518, 525; see also *Brown v. United States* (1958) 356 U.S. 148, 155 [78 S.Ct. 622, 2 L.Ed.2d 589] [criminal defendant "has no right to set forth to the jury all the facts which tend in his favor without laying himself open to cross-examination upon those facts"]; *Fost,* at p. 736.)

When any witness, including a criminal defendant, refuses to submit to proper cross-examination regarding material issues and thereby precludes the prosecutor from adequately testing the defendant's direct testimony, "the striking out or partial striking out of direct testimony is common, and has been allowed even where the result was to deprive a criminal defendant of the fundamental constitutional right to testify in his own behalf." (*Fost v. Superior Court, supra,* 80 Cal.App.4th at p. 736; see *People v. Price*

(1991) 1 Cal.4th 324, 421 ["[i]f a witness frustrates cross-examination by declining to answer some or all of the questions, the court may strike all or part of the witness's testimony"]; see also *People v. Reynolds, supra*, 152 Cal.App.3d at pp. 47-48 [trial court did not abuse its discretion in striking criminal defendant's testimony in its entirety after defendant refused to answer cross-examination questions directed to the identity of his accomplices in the crime; such refusal effectively denied the prosecution opportunity for effective cross-examination].)

Whether viewed as an exercise of the court's discretion to strike the portion of Ontiveros's testimony relating to his alibi or simply to deny the requested instruction and to leave the testimony intact in the record, the court acted well within that discretion.

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.